IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 43.

INTERSTATE COMMERCE COMMISSION,
THE BALTIMORE AND OHIO RAILROAD
COMPANY, ET AL.,
Appellants,

v.

HOBOKEN MANUFACTURERS RAILROAD COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR RAILROAD APPELLANTS, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

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OPINIONS BELOW.

The opinion of the specially-constituted District Court (R. 109), *Hoboken Manufacturers' R. Co.* v. *United States*, is reported in 47 F. Supp. 779.

The report of the Interstate Commerce Commission, dated July 24, 1939, in Docket No. 27630, *Hoboken Mfrs. R. Co.* v. *Akron, C. & Y. Ry. Co.*, appears in 234 I. C. C. 114 (R. 32).

JURISDICTION.

The jurisdiction of this Court is invoked in accordance with the authority contained in U. S. Code, Title 28, Sections 47a and 345, for the taking of a direct appeal to this Court from the final decree of a United States District Court, made pursuant to the provisions of U. S. Code, Title 28, Sections 41 (28), 43-48, enjoining, setting aside, annulling, or suspending in whole or in part an order of the Interstate Commerce Commission. The final decree of the District Court was entered on January 8, 1943 (R. 128). Petition for appeal was filed March 8, 1943, and was allowed on the same day (R. 2, 128, 132). Probable jurisdiction was noted by this Court on May 3, 1943 (R. 658).

STATEMENT OF THE CASE.

This is a direct appeal from the final decree of the specially-constituted District Court of the United States for the District of New Jersey which set aside an order of the Interstate Commerce Commission dismissing the complaint of Hoboken Manufacturers Railroad Company (hereinafter referred to as the Hoboken) for increased divisions out of certain rail rates on freight interchanged by the Hoboken with Seatrain Lines, Inc., hereinafter referred to as Seatrain. Appellants, on whose behalf this brief is presented are the principal eastern trunk line connections of the Hoboken who were defendants before

the Commission. They seek an order from this Court reversing the decree of the Court below and sustaining the Commission's order.

Proceedings Before the Commission and the Court Below.

The Hoboken on December 31, 1936, filed a complaint with the Interstate Commerce Commission alleging that the divisions it received out of joint class and commodity rates applicable on traffic interchanged at Hoboken, N. J., with Seatrain were, are, and will be unjust, unreasonably low, inequitable, and unduly prejudicial, and conversely that the divisions received by the eastern trunk line railroad defendants and their connections on such traffic were, are, and will be unjust, unreasonably high, inequitable, and unduly preferential in violation of Section 1 (4) of the Interstate Commerce Act (49 U. S. C. A. 1 (4)) (R. 22). The Commission was therein asked to exercise its power under Section 15 (6) of the Act (49 U. S. C. A. 15 (6))* to prescribe, for the past and the future, just, reasonable, equitable, and nonprejudicial and non-preferential divisions to be received by the complainant and defendants, respectively (R. 26). The Commission was called upon to consider only the divisions of rail rates and revenues as between the Hoboken and the eastern trunk lines for services performed by them on lighterage-free freight interchanged with Seatrain at Hoboken, N. J. (R. 33, 111, 150, 151, 617, 618).

* The pertinent provisions of the Interstate Commerce Act, here involved are reproduced in the Appendix, *infra*, p. 81.

Voluminous evidence, both oral testimony and exhibits, was presented at extended hearings before an Examiner of the Commission (R. 138, 616). Briefs were filed and an Examiner's proposed report containing recommended findings and conclusions was issued and served. Exceptions and replies to exceptions to the report were filed. Oral argument before the entire Commission was had (R. 32, 617). On July 24, 1939, the Commission made the report and order here involved which held against the Hoboken's contentions, and dismissed the complaint (R. 32, 642). Thereafter, Hoboken filed with the Commission a petition dated January 12, 1940, requesting reconsideration and reargument and defendants replied thereto. The aforesaid petition was denied by order dated April 1, 1940 (R. 5).

By petition filed on August 27, 1940, Hoboken brought suit in the Court below to enjoin, set aside, annul, and suspend the Commission's order of July 24, 1939 (R. 1, 2). After hearing, the specially-constituted District Court made its decision (R. 109), and entered findings of fact and conclusions of law (R. 119) and a final decree (R. 128) granting the injunctive relief sought by the Hoboken, appellee here.

NOTE: Since the principal facts material to the consideration of the questions here presented are contained and concisely stated in certain findings of the Commission, and were not challenged or disturbed by the Court below, those findings will be included herein and adopted without change as part of the Statement of the Case.

Description of The Hoboken.

"Complainant is a single-track terminal-switching line extending along the water front of Hoboken, N. J., a distance of 1.632 miles. At its northern end, approximately at the boundary between the cities of Hoboken and Weehawken, N. J., it connects with the Erie Railroad and through it with other trunk lines reaching New York Harbor. Since August, 1938, it has also had interchange with the Delaware, Lackawanna & Western Railroad through a float bridge. In addition to its main line, it has numerous yard tracks and sidings, a freight house, and team tracks. It serves numerous piers, at which various steamship lines regularly dock, and about 20 industries" (I. C. C. Report, R. 33).

Valuation of The Hoboken.

"The value for rate-making purposes of complainant's property, owned or used, devoted by it to common-carrier purposes, was $1,625,000 as of December 31, 1933. *Hoboken Mfrs. R. Co.*, 47 Val. Rep. 476. Retirements to December 31, 1937, exceeded additions and betterments by $9,862, leaving a valuation of $1,616,138 as of the latter date" (I. C. C. Report, R. 33).

Seatrain's Control of The Hoboken.

"All shares of complainant's capital stock, except five directors' qualifying shares, are owned by Seatrain. All of complainant's principal officers are officers of Seatrain, and six of complainant's seven directors are also directors of Seatrain" (R. 33).

"Seatrain acquired control of complainant April 26, 1932, following negotiations entered into some time previously with a view to the establishment of a terminal on complainant's line. Thereafter, in order to provide a terminal for Seatrain and accommodate its anticipated traffic, necessary rearrangements and improvements of complainant's facilities were made and a crane was installed for use in making interchange with Seatrain's vessels.[1] This crane, which, with its substructure, cost about $85,000, together with the pier on which it is erected and a slip alongside the pier at which Seatrain vessels are berthed, is leased by Seatrain from complainant" (R. 33-34).

Description of Seatrain.

"Seatrain is a common carrier by water subject to our jurisdiction under section 5 (19-21) of the Interstate Commerce Act., *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215 and 206 I. C. C. 328. Since October 6, 1932, it has operated vessels, on which it transports freight in railroad cars, between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba. Belle Chasse is on the west bank of the Mississippi River about 10 miles south of New Orleans" (I. C. C. Report, R. 33).

Method of Loading Seatrain Vessels.

For a description of the method of interchanging freight with Seatrain the report of the Commission

[1] "The method of interchanging freight with Seatrain is described in *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 219. Briefly, the cars are transferred between the railroad tracks and the vessel by use of a car cradle and crane" (I. C. C. Report, R. 34).

referred (R. 34) to its earlier report in *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 219. For convenience that description is here quoted:

> "Seatrain vessels are approximately 480 feet long, with 63-foot beams, and have a speed of 16.5 knots, or better. They are ocean-going vessels built to specifications of Lloyds-Register and the American Bureau for World Wide Trade. While the original vessel has tank space for 2,200 tons of liquid cargo, and the new vessels have tank space for 4,000 tons of liquid cargo, each vessel is designed primarily for transportation of cargo only when loaded in railroad cars. Each vessel has four decks, and each deck has four sets of railroad tracks of standard gage, the aggregate length of tracks on each vessel being approximately 1 mile. The original vessel has a capacity of 95 cars, and each of the new vessels has a capacity of 100 cars. These vessels can handle cargo in railroad cars only between ports at which special loading facilities have been provided. Such facilities have been provided at only three ports, namely, Hoboken, New Orleans, and Havana.
>
> "The loading facilities consist of a combination elevator and crane, the elevator shaft being erected on the dock, and the stationary arms of the crane extending from the frame of the elevator shaft out over the slip. The floor of the elevator is a movable platform called a cradle on which is laid a single track of standard gage. The cradle, when in place on the dock, forms a section of the railroad track over which cars are moved to and from the cradle. The loading facilities at Havana and New Orleans are owned

by Seatrain. Those at Hoboken are owned by the Hoboken, and together with the pier and necessary supporting tracks are leased by Seatrain. Those at New Orleans are located on the property of the New Orleans & Lower Coast Railroad Company, a subsidiary of the Missouri Pacific, and those at Hoboken are located on the property of the Hoboken.

"In loading a Seatrain vessel a car is moved by locomotive over the railroad tracks of the Hoboken or the New Orleans & Lower Coast, as the case may be, and stopped on the section of track laid on the cradle where it is blocked and secured. The four corners of the cradle are connected to bails which in turn are attached to an overhead crane. The crane through the bails and cradle lifts the car vertically until the car and cradle are higher than the bulwark of the vessel. Car and cradle are then moved along the arms of the crane to a position over one of the four hatchways of the vessel and lowered through the hatchway which forms another elevator shaft, to one of the four decks on which the car is to be stowed. The cradle for the time being becomes a part of that particular deck, the tracks on the cradle articulating with the tracks on the deck to form a continuous track over which the car is moved from the cradle by a car puller to the desired position on the deck track, where it is secured and made fast to take care of motion of the ship while at sea. When a deck has been loaded the cradle is left in place and serves as a hatch cover for that deck. Unloading is the reverse of the process of loading. Often cars may be loaded

and unloaded at the same time. That is, the cradle instead of being hoisted out empty is loaded with a car, lifted out of the ship, moved along the crane arms to the elevator shaft over the dock, and lowered to position in the railroad track over which the car is moved from the cradle by a locomotive."

The opinion of the District Court summarizes the description of the method of loading Seatrain vessels as follows:

"When a Seatrain ship is put in position at its dock, it is next to a 'cradle' which, by means of a large overhead crane, lifts the loaded freight car from the dock and carries it through one of a number of large hatches on the ship to one of the tracks within the vessel. The tracks of the cradle fit the tracks on ship, and the car is then pushed off the cradle to its place on the ship by a special little engine. There is one cradle for each track on each deck of the vessel and, when the loading of each deck is accomplished, the cradles are left in place flush with the deck, each cradle closing a hatch. In taking the car from ship to shore the process is reversed. By the use of the Seatrain method, goods and merchandise may be transported from shore to ship and from ship to shore without breaking bulk, and the necessity of loading and unloading the freight is eliminated" (Opinion Court below, R. 110).

Photographs showing the method of loading Seatrain vessels appear at pages 462-468 of the Record.

Classes of Traffic Interchanged Between the Hoboken and the Trunk Lines.

"The traffic which complainant interchanges with defendants may be divided into four general classes: (1) Carload freight from and to private sidings and team tracks, which is loaded and unloaded at the consignees' expense, (2) less-than-carload freight from or to complainant's freight house, which is loaded or unloaded by complainant, (3) freight from and to steamship lines other than Seatrain, and (4) freight from and to Seatrain" (I. C. C. Report, R. 34).

The Rates to Be Divided.

The Commission was not asked to divide all the rail rates which applied on freight to and from Seatrain, but only those rates under which the railroads will deliver or accept freight at shipside. These are generally termed lighterage-free rates (R. 34, 46, 111). In addition to the above mentioned rail rates, to which Seatrain was not a party, the Commission was asked to divide the eastern rail portions of joint rail-water-rail rates in which Seatrain was a participant (R. 140, 280). At the time of the hearings before the Commission in 1938 there were in effect a few such joint rates from origins in the Southwest via Seatrain and Hoboken, N. J., to interior eastern destinations (R. 140, 618). In *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7 (1938); 243 I. C. C. 199 (1940), the Commission by order effective May 1, 1941, prescribed joint rail-water-rail rates between eastern trunk line and New England territories and southwestern terri-

tory applicable via Seatrain lines and the rail line (including the Hoboken and the trunk lines) serving these territories (R. 643-646). Under the rail portions of these joint rates, the eastern rail lines perform the same services to and from shipside as under the lighterage-free rates, and the latter term will include such rail portions of such joint rates.

In I. C. C. Docket No. 28668, now pending, *Seatrain Lines, Inc.* v. *The Akron, Canton & Youngstown Railway Company et al.*, in which the Hoboken and the trunk lines are among the defendants named, Seatrain alleges that its divisions of such joint rates for its transportation by water of traffic handled in connection with the eastern rail lines via Hoboken, N. J., are unreasonably low, seeks increased divisions, and in support thereof relies in part upon the alleged labor-saving value of its special cradle and car elevator devices and patent (R. 643).

Rail Terminal Service Under Lighterage-Free Rates.

When lighterage-free rates are applicable, the railroads place the freight alongside the steamship within reach of the ship's tackle or receive the freight at the foot of the ship's tackle. If the steamship is of the ordinary cargo type, frequently referred to as a break-bulk carrier, the railroads at their expense load or unload the freight cars if necessary to placement or receipt of the freight at the foot of ship's tackle. Where it is done for them by the Hoboken, they compensate the latter therefor through divisions

of the freight revenue. The expense incurred in loading or unloading the ship is borne by the steamship line. On non-lighterage-free freight the railroads do not place or receive the freight at the foot of ship's tackle. On such freight the railroad cars are placed on the piers if they have railroad tracks, and if not, at the rail point nearest to shipside, and the cars are loaded or unloaded at the expense of the steamship line or others, and not at the expense of the railroads (R. 34, 47, 110, 114, 158).

The interchange services on lighterage-free freight at New York harbor are variable as to form and dependent upon various facts and conditions. The costs to the railroads for accomplishing such services are also variable. On lighterage-free freight interchanged with a break-bulk steamship the expense of loading or unloading the cars is borne by the trunk lines if such service is necessary to placement or receipt alongside vessel. Lighterage is frequently employed in the interchange of freight with break-bulk steamships not directly served by rail. Some steamships, such as those of the Pan-Atlantic S. S. Co., served by the Hoboken, dock at piers having rail connections, so that no lighterage service is performed. At certain railroad terminals, particularly on the New Jersey shore, freight in open-top cars is delivered direct to the vessel by being placed alongside ship within reach of ship's tackle. This does not entail any expense for either lightering or unloading of the car. In such cases, where lighterage-free freight

can be placed or received alongside vessel without unloading or loading, the railroads do not pay or bear stevedoring, loading, or unloading costs because there are none (R. 34, 46, 48, 158, 176-178, 418-420).

The Hoboken's Switching Service on Seatrain Traffic.

"Cars for Seatrain are placed in a hold yard a short distance from Seatrain's pier, which is approximately 2,500 feet from the point of interchange with the Erie. They are switched from the hold yard to the pier in the order designated by Seatrain, usually one at a time, and placed on the car cradle, where complainant's services terminate'* (I. C. C. Report, R. 35).

The Hoboken Divisions.

The Hoboken is a short terminal switching line, and has for many years participated in joint rates with the trunk lines and has received divisions thereof (R. 36).

On carload shipments loaded or unloaded by the shipper or consignee, or at their expense, the Hoboken's division prior to March 28, 1938,† was 60 cents per ton and, subsequent thereto, 63 or 66 cents per ton dependent upon the commodity. On carload shipments loaded to or unloaded from cars by the Hoboken when necessary to accomplish railroad acceptance or delivery of freight at shipside the Hoboken's division prior to March 28, 1938, was

* A corresponding service is performed in the reverse direction.

† The effective date of the 5 and 10 percent general increases authorized in *Ex Parte 123, Fifteen Percent Case*, 1937-1938, 226 I. C. C. 41.

$1.35 per ton, representing 60 cents for switching and 75 cents for loading or unloading. As a result of the *Ex Parte 123* increases these divisions became $1.42 and $1.49, respectively (R. 37).

Since the interchange of freight with Seatrain at Hoboken, N. J., is by loaded car, no loading or unloading at shipside is necessary. The trunk lines therefore have paid the Hoboken on such traffic 60 cents a ton prior to March 28, 1938, and 63 or 66 cents a ton subsequent thereto (R. 37-38, 46, 47).

The 63 and 66-cent allowances represent an increase of 215 and 230 percent, respectively, over the 20-cent per ton division in effect prior to July 1, 1918. If the Hoboken's original division of 20 cents had been increased in accordance with the general percentage rate increases and reductions authorized or required by the Commission, its divisions at the time of the hearings in 1938 would have been 38, 40, or 42 cents, varying as to commodities and territorial application of the rates (R. 427).

Divisions Sought By the Hoboken.

The Hoboken does not seek an increase in its division of 60 cents (exclusive of *Ex Parte 123* increases) on its rail traffic to and from private sidings, team tracks, and freight house, or on its non-lighterage-free freight interchanged with break-bulk steamships or with Seatrain. The claim for an increase from 60 cents to $1.35 is limited solely to lighterage-free freight interchanged with Seatrain (R. 34, 38). As found by

the Court below, "In the case at bar we are concerned only with the lighterage-free rate, and how it shall be divided between Hoboken and the trunk line carriers" (R. 111). On both the non-lighterage-free and on the lighterage-free traffic interchanged with Seatrain, the switching and terminal services of the Hoboken are identical (R. 38, 110). "With Seatrain freight regardless of how it is billed, whether as lighterage-free freight or non-lighterage-free freight, it is handled by Hoboken in precisely the same physical fashion" (R. 110). Under both types of rates, the freight remains in the railroad cars, and no loading or unloading expense is actually incurred by the Hoboken (R. 47).

The Hoboken's Payments to Seatrain.

The Hoboken's claim for increased divisions on lighterage-free freight interchanged with Seatrain, and which is neither loaded nor unloaded rests on certain payments made by the Hoboken to Seatrain (R. 38, 46).

> "Whether it is entitled to a greater division out of the lighterage-free rates depends in large part on whether certain payments which complainant makes to Seatrain may be properly included in its costs for performing its part of the rail transportation to and from Hoboken" (I. C. C. Report, R. 38).

> "The original contract entered into November 21, 1932, provided that complainant should pay Seatrain 40 cents per ton on all freight, other than coal, interchanged between them. A part of the

consideration for this payment was that Seatrain, as agent for complainant, should move the cars between complainant's hold yard and Seatrain's car cradle, the agreed point of interchange. This contract was superseded effective March 1, 1937, by a contract, still in effect, which provides that complainant shall pay Seatrain 73 cents per ton[3] on all freight interchanged between them which moves on lighterage-free rates but nothing on freight moving on non-lighterage-free rates. Under this contract Seatrain does not move the cars between complainant's hold yard and the car cradle, all such service being performed by complainant. The underlying justification for these payments is that, as it is not necessary to load and unload freight to and from railroad cars in making interchange with Seatrain, defendants are relieved of an expense of 75 cents per ton for loading or unloading which they incur when freight moving under lighterage-free rates is interchanged with other water carriers, and that, as this saving is possible because of Seatrain's investment and use of patented devices, such saving should accrue to Seatrain and not to defendants" (I. C. C. Report, R. 38-39).

"It appears from the Commission's report that Hoboken paid Seatrain $110,000 in 1936, pursuant to the provisions of the 1932 contract; that in 1937 Hoboken paid Seatrain approximately $100,000" (Opinion Court below, R. 114).

Seatrain's Patent.

"Seatrain vessels and loading devices are not patented, but the idea embodied by the Seatrain

[3] "Subject to revision because of increase or decrease in the scale of longshoremen's wages but not as yet revised" (I. C. C. Report, R. 38).

vessels for carrying cars and for transferring cars from railroad tracks or from the deck of another ship to tracks laid on Seatrain vessels is patented. Seatrain has the exclusive right to use these patents."*

Witness Brush, President of Seatrain and the Hoboken, after describing the patent as "a combination patent," stated:

> "A. In other words, it is not a vessel, it is not a terminal, it is not a crane; it is a combination of various devices which, when all put together, form the Seatrain terminal and ship" (R. 227).
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> * * * * * *
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> "The Seatrain patent is a combination patent. Before you run into that patent you would have to pick up a car and put it inside of a ship or inside of a ship structure and the ship would have to be equipped to take the car. In other words, the patent is a ship's equipment to load cars on its various decks by various means so that cars may be received from railroad tracks on the dock or from another ship and transferred to the ship's equipment."
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> * * * * * *
>
> "The crane itself is not patented. It is the use of the crane in connection with the ship" (R. 372).

The Seatrain patent is owned by Railway Transports, Inc., and Seatrain as the exclusive licensee pays royalties of approximately $50,000 a year (R. 39).

* Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, 220, to which the Commission's report refers (R. 34) for a description of the method of loading Seatrain vessels.

"The patents expire in 1944"† (Opinion Court below, R. 112).

The Hoboken's Switching Costs.

"Complainant shows its average costs for switching all cars, including those containing less-than-carload freight, in 1936 and 1937. These costs include all taxes, other than those billed to Seatrain, the net amounts paid for all rents, including those for all leased road, and all interest on indebtedness, but do not include payments of 40 or 73 cents per ton to Seatrain or expenses incurred in connection with the handling of freight. The total costs were divided by the number of all loaded cars handled in common-carrier service, 14,961 in 1936 and 15,799 in 1937, and also by the number of tons handled, 411,757 in 1936 and 431,252 in 1937. The average costs so determined were $15.34 per car and 55.7 cents per ton in 1936 and $16.11 per car and 59 cents per ton in 1937. The average loading was 27.5 tons in 1936 and 27.3 tons in 1937" (I. C. C. Report, R. 40).

The Hoboken's Revenues.

"Assuming that all items included in the costs are properly so included, and, as complainant assumes, that its average costs for switching

† This statement of the Court was apparently taken from the Commission's finding (R. 39) that the Seatrain patents "will expire in about 6 years" (presumably from the time of the hearing in 1938) which finding was predicated upon a rather indefinite statement in this respect of Witness Brush (R. 371). Although not a matter of record, in the interest of accuracy, it is a fact that U. S. Patent No. 1,591,278, issued July 6, 1926, to Graham M. Brush, covering the Seatrain devices and method of operation and which was assigned by him to Railway Transports, Inc., expired July, 1943.

all cars reflect its costs for the movement here involved, its costs are less than its divisions of 60 cents per ton prior to the increases in *Ex Parte No. 123*, and 63 and 66 cents per ton since, and less than its revenues per car under such divisions. As previously stated, the average loading of the 2,961 carloads interchanged by complainant with Seatrain and defendants during the six alternating months of 1936 and 1937 was 28.5 tons. Other evidence of record indicates that the average loading of Seatrain traffic interchanged with defendants is approximately 30 tons. Complainant's revenues per car under the 60-cent division would be $17.10 and $18 based on average weights of 28.5 and 30 tons. The present divisions of 63 and 66 cents would have averaged 65.48 cents per ton on the 2,961 carloads referred to above. Based on that average, complainant's revenues per car of 28.5 tons and per car of 30 tons would be $18.66 and $19.64 respectively" (I. C. C. Report, R. 40).

"The fixed charges for rent of road and interest on indebtedness included by complainant in its costs were $54,729.60 in 1936 and $59,149.86 in 1937. If there were substituted for these fixed charges $80,806.90, which is a 5-per cent return on the value of the property owned or used by complainant and devoted to common carrier purposes, $1,616,138 as of December 31, 1937, the average cost for switching of cars would have been $17.08 in 1936 and $17.50 in 1937, as compared with revenues of $17.10 per car of 28.5 tons under the 60-cent division and $18.66 under an average division of 65.48 cents" (I. C. C. Report, R. 40-41).

"The record warants the conclusion that the former division of 60 cents and the present divisions of 63 and 66 cents are sufficient to cover the cost of the service performed by complainant and also a reasonable return on the property owned or used by it in performing such service" (I. C. C. Report, R. 41).

After an extended analysis of the Hoboken's revenues and expenses, the Commission found that the Hoboken was operating at a profit if the payments to Seatrain were not taken into account (R. 41-44). The Court below accepted the Commission's finding on this point (R. 114, 124).

The Unfavorable Financial Condition of the Trunk Lines.

"As contrasted with complainant's income accounts for 1936 and 1937 as adjusted by it and as further adjusted, the net railway operating income for 10 New York Harbor railroads[4] show a rate of return on investment in railway property used in transportation ranging from nothing to 3.23 percent in 1936 and from nothing to 2.72 percent in 1937, and for the 10 roads as a whole 2.67 percent in 1936 and 2.21 percent in 1937. Four of the ten roads, namely, the Erie, the New Jersey & New York, the New York, Ontario & Western, and the New York, Susquehanna & Western are in bankruptcy" (I. C. C. Report, R. 44).

[4] "Baltimore & Ohio; Central Railroad of New Jersey; Delaware, Lackawanna & Western; Erie; Lehigh Valley; New Jersey & New York; New York Central; New York, Ontario & Western; New York, Susquehanna & Western; and Pennsylvania" (I. C. C. Report, R. 44).

The Hoboken's Revenue Under Claimed Division.

"Complainant also shows that during the months of March and September it interchanged with defendants 1,102 carloads of Seatrain traffic and that the average loading of these cars was 30.9 tons, the average rail haul 258 miles, and the average revenue $120.86 per car. Complainant's revenue on such traffic at 60 cents per ton was $18.54 per car and 15 percent of the total revenue. On the basis of a division of $1.35 it would have been $40.72 per car, leaving slightly less than two-thirds of the total revenue to defendants for their 258-mile haul and terminal service at origin" (I. C. C. Report, R. 45).

There are numerous instances where a division of $1.35 per ton would have accorded the Hoboken more than half of the total rail revenue to be divided between the Hoboken and the trunk lines. For example, on 25 cars of wire and wire articles from Allentown, Pa., to Hoboken, N. J., the total rail revenue, at a lighterage-free rate of $1.80 per ton, amounted to $1,341.36, of which the Hoboken's share would have been $952.09, or 71 percent, on the basis of the claimed division of $1.35 per ton (R. 580, 593, 428-429, 433, 456).

NOTE: To avoid needless repetition, such additional facts as are necessary to the Argument will be included therein with appropriate record references.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.*

The District Court erred:

1. In not dismissing the petition of plaintiff herein.

2. In setting aside the Commission's order of July 24, 1939, involved in this case.

3. In substituting its judgment for that of the Commission upon an administrative matter.

4. In directing the Commission to reinstate the proceedings before it, to reconsider its decision, to make findings of fact as indicated in the opinion of the Court, and to issue and enter a report in the proceedings and make such an order or orders therein as may be required by law.

5. In finding and holding that the Interstate Commerce Commission failed to make all essential findings.

6. In holding that the Commission did not determine a division of the rates which would not be unduly prejudicial or preferential to any of the parties.

7. In concluding as a matter of law that the Commission did not carry out the duty imposed upon it by statute in a divisions case.

* (R. 129-132).

8. In not holding that the Commission's findings are supported by substantial evidence.

9. In entering the findings of fact and conclusions of law which it made in this case.

10. In inconsistently granting an injunction setting aside the Commission's order of July 24, 1939, involved in this case, after holding (*a*) that the railroad-appellants perform the service which they hold themselves out under the lighterage-free rates to perform when they place the cars at the cradle or receive them from the cradle; (*b*) that the proceedings before the Commission were fair and adequate in every way; (*c*) that the question of where transportation ends is an administrative question; (*d*) and that the Commission's finding that the payments made by Hoboken to Seatrain do not constitute a legitimate rail transportation cost, being supported by evidence, is final.

11. In finding and holding that the Interstate Commerce Commission failed to give due consideration to the matters specified in the statute (49 U. S. C. Sec. 15 (6)) and failed to consider, find, and determine what divisions of the railroads' lighterage-free rates were and would be just, reasonable, and equitable as between the carriers parties thereto.

12. In holding that the Commission did not make a finding "as to whether or not reasonable payment to Seatrain for the benefits derived by Hoboken and

through Hoboken by the trunk lines from the interchange with Seatrain and the use by Seatrain of its patented devices in connection therewith, is part of Hoboken's costs of operation under efficient operation in the transfer of freight between the trunk lines and Seatrain."

13. In concluding and holding that if the Commission should find that the Seatrain devices are an efficient aid to railroad transportation, the Commission should evaluate the worth of the devices to Hoboken and a legitimate payment therefor, including in the base upon which Hoboken's fair return is calculated the true value of the Seatrain devices.

14. In finding and concluding that as a further ground for its decision "the Commission found that the payments might be justified as a part of Hoboken's expense if they were 'necessary for the purpose of inducing the establishment of the new method of transfer,' * * *."

15. In finding that Hoboken makes Seatrain its agent to put the cars upon and take them off the cradle.

16. In holding that the Commission erred in failing to make an equitable division of "the 75¢ saving occasioned by the inter-connection with Seatrain."

17. In finding and holding that the Commission failed to find and "determine what would be reason-

able and fair compensation in the light of efficient management and operation of Hoboken's properties."

18. In concluding that Hoboken has the right under its contract with Seatrain to use the Seatrain devices "to fulfill its obligations of carriage," thereby substituting its judgment for that of the Commission as to the scope of Hoboken's said obligations.

19. In holding that there was no evidence presented to the Commission "to show that the granting of the entire saving of the loading or unloading of the cars was not an undue emolument for the trunk line railroads."

SUMMARY OF ARGUMENT.

The Hoboken, a short switching railroad on the New Jersey shore of New York Harbor, brought a complaint before the Interstate Commerce Commission seeking the prescription of increased divisions out of the lighterage-free rail rates to and from Hoboken, N. J., when applied on traffic interchanged with Seatrain, a common carrier by water and its parent company. Its case centered upon the insufficiency of its existing divisions to reimburse it for certain payments to Seatrain under an agreement, to which the defendant trunk lines were not parties, made subsequent to the filing of its complaint, and upon the fact that if, by the operation of such increased divisions and the agreement with Seatrain, the trunk lines were not

required to contribute to Seatrain therefor, they would gain some unearned benefit from Seatrain's use of its car, crane or ship-loading device by escaping expense for loading and unloading cars of lighterage-free freight interchanged with Seatrain. The Hoboken made no payment to Seatrain in respect of non-lighterage-free freight, and asked no increase in its divisions of the rail rates thereon, although its service in interchanging with Seatrain was identical in both cases. The Commission found that rail transportation under the rates to be divided began or ended with placement or receipt of the car by the Hoboken at the Seatrain cradle, and that the payments by the Hoboken to Seatrain covered no part of the costs of rail transportation. It further found that the Hoboken's existing divisions were not unjust, unreasonably low, inequitable, or unduly prejudicial to it, and that the corresponding divisions received by the defendant rail lines were not unjust, unreasonably high, inequitable, or unduly preferential of them. It ordered the complaint dismissed.

The District Court accepted as final and conclusive the Commission's findings that rail transportation did not extend beyond the point of interchange at the cradle and that the Hoboken's payments were not a part of the costs of rail transportation, but nevertheless set aside the order and remanded the case to the Commission for further proceedings on the ground that the Commission failed to fix divisions for the Hoboken which would allow it an equitable and non-prejudicial

proportion of the so-called "windfall" accruing to the railroads on traffic so interchanged by reason of the absence of expense to them for loading or unloading cars at the port.

The argument of these railroad appellants, defendants in the case before the Commission, may be summarized as follows:

I. In the exercise of its power under Section 15(6) of the Interstate Commerce Act to prescribe reasonable and equitable divisions of joint rates, the Commission made administrative findings of fact that rail transportation under the rates to be divided began or ended at the cradle, and that the payments to Seatrain were not part of the costs of the rail service. Although accepting these findings as conclusive upon it, the District Court set aside the Commission's order, holding that the Commission should have given weight, in the fixation of the Hoboken's divisions, to matters which were beyond the scope of the rates to be divided, and thereby substituted its judgment for that of the Commission in an administrative matter, which it may not lawfully do.

II. The Commission's findings which the District Court accepted as final required the dismissal of plaintiff's petition, and the Court erred in remanding the case to the Commission. The Commission had found that rail transportation, under the rates to be divided, begins or ends at the Seatrain cradle, and that the payments by the Hoboken to Seatrain cover no part

of the rail service. These findings were of an administrative character and were binding upon the Courts. *Armour & Co.* v. *Alton R. R. Co.*, 312 U. S. 195; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402. These findings the District Court accepted as final. The rail rates which the Commission was asked to divide were applied on certain rail-water traffic interchanged with Seatrain, and it became necessary for the Commission to determine the boundary between such rail and water transportation in order to determine whether the payments made Hoboken to Seatrain were properly a part of rail transportation costs or were a part of the costs of water transportation. The whole case before the Commission turned on the question whether the payments to Seatrain were a part of the rail transportation costs for which the Hoboken was entitled to reimbursement by the trunk lines by way of increased divisions. The Hoboken conceded that its existing divisions were adequate if the payments were not properly includible in the rail costs. The Commission's findings on the subject were therefore determinative of the case, and the District Court, having accepted them as conclusive, should have dismissed plaintiff's petition.

III. The District Court, due to its misconstruction of the Commission's report and its misunderstanding of the facts on which the Commission acted, erroneously concluded that the Commission did not determine the "*quantum meruit*" of the Hoboken-

Seatrain relationship or the proper apportionment of the so-called "windfall" to the railroads by reason of the absence of expense to them for loading or unloading cars of freight interchanged with Seatrain. Contrary to the Court's assumptions, the car crane at Hoboken, N. J., was leased, operated, and used exclusively by Seatrain, and is the equivalent of ship's tackle, and the Hoboken did not secure, by its payments to Seatrain, the actual performance of any rail transportation service which it was obligated to perform under the rail rates. The lighterage-free rates involved did not require the eastern railroads to load, unload, or to lighter freight in New York Harbor, when to be interchanged with water carriers, except to the extent necessary to accomplish receipt or delivery of freight at shipside. The lack of expense for loading or unloading freight interchanged with Seatrain in cars was therefore not a "windfall" in any true sense. Had the Commission sustained the Hoboken's complaint the effect would have been to impose upon the trunk lines the expense of loading and unloading Seatrain's vessels. But if, contrary to fact, there were such a "windfall," it would be a matter for division as between the eastern railroads and *Seatrain*, which is not a carrier by railroad and not a party to the proceeding. Seatrain now has pending before the Commission a case of this nature, which is a complaint seeking the prescription of divisions, as between itself and the railroads, of joint rail-water rates, in which it asks that the divisions to be fixed

take into consideration such economies in terminal services as may result to the railroads from its use of its ship-loading devices. But assuming, *arguendo* that there was a "windfall" for division between the Hoboken and the trunk lines in the instant proceeding, the Commission's finding and order in the case made an equitable and non-prejudicial division of it.

IV. The District Court erred in holding that the Commission failed in its statutory duty to prescribe just, equitable, and non-prejudicial divisions. The Hoboken presented its case on the theory, which the Commission here accepted, that it should receive as a division a uniform amount per ton without particular regard to the balances remaining to the trunk lines. The Commission found that the Hoboken's existing divisions were sufficient to cover the cost of the service performed by it and also a reasonable return on the property owned or used by it in performing such service, and also found that complainant's existing divisions, all things considered, were not unjust, unreasonably low, inequitable, or unduly prejudicial as to it, or unreasonably high, or unduly preferential as to the defendants.

V. The District Court erred in directing the Commission in this case (to which Seatrain is not a party) to find whether the Seatrain devices are an efficient aid to railroad transportation, to evaluate their worth to the Hoboken and a legitimate payment therefor, to include in the base upon which the Hoboken's fair

return is calculated the true value of the Seatrain devices, and to set the value of the contract and the Seatrain devices to the Hoboken. The Seatrain devices and the contract were of no value to the Hoboken in the performance of rail transportation service under the rates to be divided, and the Commission so found. As the devices were Seatrain's, and were not used by the Hoboken, the Commission could not properly value them in the base upon which the Hoboken's fair return is calculated. Any valuation of Seatrain's devices for determining divisions would have to be in some case, such as Seatrain's pending divisions complaint, where Seatrain and the trunk lines were parties. This is not such a case.

ARGUMENT.

I. THE DISTRICT COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION IN AN ADMINISTRATIVE MATTER.*

The Commission found that rail transportation under the lighterage-free rates to be divided began or ended at the Seatrain car cradle and that the payments made by the Hoboken to Seatrain should be excluded from the Hoboken's operatings costs in the determination of divisions. *Both of these findings were accepted by the District Court as conclusive.* It necessarily followed from these findings that the Hobo-

* This point is supported by Assignments of Error Nos. 1, 2, 3, 4, 6, 7, 9, 10, 11, 13, 18, and 19 (R. 129-132).

ken was not entitled to increased divisions, and the Commission so found. The Court disagreed with the Commission's conclusion and held that it was the duty of the Commission in determining divisions to give weight to matters which are no part of the Hoboken's rail service under the rates to be divided. In so doing it substituted its judgment for that of the Commission in an administrative matter.

The divisions complaint of the Hoboken involved the exercise of the Commission's power under Section 15(6) of the Interstate Commerce Act, 49 U. S. C. 15(6). The prescription of divisions of joint rates under this statute has been held by this Court to be a legislative function. *Baltimore & Ohio R. R.* v. *United States*, 298 U. S. 349, 356. *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17, 30. *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298, 305, 307.

The law bearing upon the scope of judicial review in these circumstances is well settled by decisions of this Court.

The Courts, in reviewing orders of the Commission, may not consider the weight of the evidence, the wisdom of the Commission's action, or the soundness of reasoning by which the Commission reached its conclusions. *New England Divisions Case*, 261 U. S. 184, 204; *Virginian Ry.* v. *United States*, 272 U. S. 658, 665, and *Chicago, R. I. & P. Ry.* v. *U. S.*, 274 U. S. 29, 33.

Furthermore, the findings and conclusions of the Commission, made after hearing, are final and con-

clusive if supported by substantial evidence and sustainable on any rational basis, unless there was some irregularity in the proceeding, or some error in the application of the rules of law. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 321; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *Western Chem. Co.* v. *United States*, 271 U. S. 268, 273; *United States* v. *Erie R. Co.*, 280 U. S. 98, 102; *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, 139, and *Board of Trade* v. *United States*, 314 U. S. 534, 546.

The limitations of judicial review of orders of the Commission were stated in *Rochester Tel. Corp.* v. *U. S.*, *supra*, at pages 139 and 140, as follows:

> "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U. S. 541."

In the case just cited, at page 146, it is said:

> "'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-287; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303, *et seq.*"

II. THE COMMISSION'S FINDING THAT THE PAYMENTS TO SEATRAIN WERE NO PART OF THE COSTS OF RAIL TRANSPORTATION, WHICH THE COURT ACCEPTED AS FINAL, NECESSARILY REQUIRED THE DISMISSAL OF PLAINTIFF'S PETITION, AND THE COURT ERRED IN REMANDING THE CASE TO THE COMMISSION.*

A. The Commission Found that Rail Transportation Begins or Ends at the Seatrain Cradle, and that the Payments by the Hoboken to Seatrain Cover No Part of the Rail Service.

On the evidence presented the Commission made the following findings of fact:

> "The service which the railroads hold themselves out to perform under the lighterage-free rates includes the unloading of inbound cars and the placing of the lading within reach of the ship's tackle and a corresponding but reverse service in connection with outbound freight. For purposes of its own, Seatrain prefers to receive and deliver the loaded car. The unloading or loading of the car lading and its delivery or receipt at ship's tackle is therefore unnecessary. The rail lines do all that is required when they place the cars in or take them from the Seatrain cradle. From this point of view the payments which complainant makes to Seatrain cover no part of its transportation service under the lighterage-free rates and are in addition to the full costs of that service" (R. 47).

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*This Point is supported by Assignments of Error Nos. 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, and 19 (R. 129-132).

B. The District Court Accepted as Final and Conclusive the Commission's Findings That Rail Transportation Begins or Ends at the Seatrain Cradle and that the Hoboken's Payments to Seatrain Covered No Part of the Costs of Rail Transportation.

The District Court accepted the above-indicated findings of the Commission as conclusive. Thus at Record pages 115-116 it held as follows:

> "Admittedly the Commission as the trier of fact must determine the point at which the transportation service of the railroad is completed and, if the Commission's finding in this respect is supported by substantial evidence, the parties and this court are bound upon it. The question of where transportation by rail ends is an administrative question. *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 201; *United States* v. *American Sheet & Tin Plate Company*, 301 U. S. 402; *United States* v. *Pan American Petroleum Corporation*, 304 U. S. 156. Even though we might reach a different conclusion, if there is evidence to support the Commission's findings, its order must be sustained. *New England Division Case*, 261 U. S. 184, 204; *Seaboard Airline Ry. Co.* v. *United States*, 254 U. S. 57, 62. The finding by the Commission that rail transportation ends at the cradle when Hoboken has put the car consigned for Seatrain upon it and begins at the cradle when the movement is reversed is fully supported by the evidence. The contract of November 21, 1932, between Hoboken and Seatrain expressly so provided, and the contract of February 24, 1937, now in force between Hoboken and Seatrain, makes no substantial change

in this respect although Hoboken makes Seatrain its agent to put the cars upon and take them off the cradle. Since, as the Commission determined, transportation ends at the cradle, Hoboken completes its obligation under the lighterage-free tariff when it delivers the cars to the cradle. The Commission, therefore held that the payments by Hoboken to Seatrain do not constitute a legitimate transportation cost. Upon this findings, supported by evidence, its judgment is final. *United States* v. *Pan American Petroleum Corporation*, 304 U. S. 156."

C. The Commission's Findings on These Matters Required the Dismissal of the Complaint.

1. THE COMMISSION WAS ASKED TO DIVIDE RAIL RATES APPLIED ON RAIL-WATER TRAFFIC, AND NECESSARILY DETERMINED WHERE RAIL TRANSPORTATION BEGAN OR ENDED.

By its complaint before the Commission (R. 22) the Hoboken sought increased divisions on only a portion of its traffic. Thus, it asked no increase in its divisions on carload freight from and to private sidings and team tracks, on less-than-carload freight from or to its freight house, or on freight from and to steamship lines other than Seatrain. Nor did it seek increased divisions on such of its freight from and to Seatrain as moved under non-lighterage-free rates. But it sought an order requiring the trunk lines to accord it increased divisions out of the lighterage-free rail rates applied on its Seatrain traffic and out of the revenues accruing to the eastern railroads out of joint rail-water or rail-water-rail rates in connection with

Seatrain (R. 140). Since such rates and revenues accrued to the railroads out of rail-water traffic,* and since in the division of such rates and revenues the respective service contributions of the participants is a primary consideration,† it was incumbent upon the Commission to determine the physical extent of the transportation service comprehended under such rail rates and revenues.

This necessity of determining the scope and coverage of the rail factors to be divided obtained equally in the case of joint rail rates to and from Hoboken, N. J., to which Seatrain was not a party, and in the case of the joint rail-water rates in which Seatrain was a participant. The fact that Seatrain was not named as a party to the Hoboken's complaint did not prevent the Commission from fixing the subdivision as between the Hoboken and the trunk lines of the primary rail divisions without reference to the balance of the joint rates by water beyond. This point has been specifically ruled in *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 89-90.

2. The Whole Case Turned on the Question Whether the Payments to Seatrain Were a Part of the Rail Transportation Costs.

The Hoboken presented its claim for increased divisions on the theory that it was a short switching line and, as such, was entitled to divisions which would fully reimburse it for all transportation costs plus a

* For convenience the expression "rail-water" traffic will be understood as including also water-rail and rail-water-rail traffic.

† New England Divisions, 66 I. C. C. 196, 198.

fair return (R. 46, 47). The importance of the Hoboken's payments to Seatrain, in connection with the determination of legitimate operating costs, was emphasized by the Hoboken's counsel at the hearings before the Commission (R. 154, 215, 219), and upon argument before the Commission he stated (R. 618-619) in part:

> "There is a fundamental issue in the case * * *. That issue is whether for the purpose of determining the divisions to be received by the Hoboken or the divisions to be retained by the defendants. There may properly be included in the Hoboken's costs of operation certain payments which the Hoboken makes to Seatrain Lines under a contract between the complainant and Seatrain."
>
> * * * * * * *
>
> "* * * *If these payments by the complainant to Seatrain may not fairly and properly, lawfully, be included as a part of the costs of the Hoboken for the purposes of divisions here, then the divisions which the defendants have so far allowed to the complainant are adequate divisions and we are not entitled to anything more.*"

The Commission recognized the question whether the Hoboken's payments to Seatrain constituted payment for rail transportation to be one of the controlling factors in determining whether the Hoboken was entitled to increased divisions, saying (R. 38):

> "Whether it is entitled to a greater division out of the lighterage-free rates, depends in large part on whether certain payments which complainant

makes to Seatrain may be properly included in its costs for performing its part of the rail transportation to and from Hoboken."

3. THE COMMISSION'S FINDING THAT THE PAYMENTS WERE NO PART OF THE RAIL TRANSPORTATION COSTS WAS DETERMINATIVE OF THE CASE.

The Commission's findings that rail transportation under the rates to be divided began or ended at the Seatrain cradle and that the Hoboken's payments to Seatrain constituted no part of the rail transportation costs—which findings the Court held were conclusive—were determinative of every issue presented in the case.

Since the Commission's authority to prescribe divisions was invoked only in respect of the division of rail rates and revenues as between participating rail carriers, its determination of the physical limitations of rail transportation and of the extent of the railroads' obligations under such rates, together with its finding that the payments made by the Hoboken to Seatrain were not in any way attributable or allocable to rail transportation as cost thereof, left no alternative to the Commission but to dismiss the complaint.

D. Having Accepted As Conclusive the Controlling Findings in the Case, As Made by the Commission, the District Court Should Have Dismissed Plaintiff's Petition.

The District Court, having sustained these findings of the Commission, which were controlling in the

case, should have dismissed plaintiff's petition. The District Court, however, as will subsequently be noted, by reason of its misconstruction of the Commission's report and its misunderstanding of the facts with which the Commission dealt, went beyond the proper scope of judicial review, and, while disavowing any intent so to do, actually substituted its judgment for that of the Commission in an administrative matter in that its decree remanding the case to the Commission in effect requires the Commission to give some weight in the fixing of divisions to the Hoboken's payments to Seatrain.

III. THE DISTRICT COURT, DUE TO ITS MISCONSTRUCTION OF THE COMMISSION'S REPORT AND ITS MISUNDERSTANDING OF THE FACTS, ERRONEOUSLY CONCLUDED THAT THE COMMISSION DID NOT DETERMINE THE "*QUANTUM MERUIT*" OF THE HOBOKEN-SEATRAIN RELATIONSHIP OR THE PROPER APPORTIONMENT OF THE "WINDFALL."*

A. The Decision of the District Court Is Based Upon a Misconstruction of the Commission's Discussion of the Question Whether Payments to Seatrain Might Be Justified For the Purpose of Inducing the Establishment of Seatrain's New Method of Transfer.

Since the Court accepted as final the Commission's findings as to the limits of rail transportation service

* This point is supported by Assignments of Error Nos. 5, 6, 7, 8, 9, 11, 12, 14, 15, 16, 17, 18, 19 (R. 129-132).

under the rates to be divided and with respect to the exclusion of the Hoboken's payments to Seatrain from the legitimate costs of its rail service, it is apparent from an examination of the opinion and findings of the District Court that its decision rests largely upon the following statement of the Commission which the Court quoted in full (R. 48, 116):

> "While, therefore, the payments are not made for any service which the rail lines perform under the lighterage-free rates, there is a remaining question whether such payments may be justified, in any way and to any extent, as compensation properly payable to Seatrain for the savings which it has accomplished for the rail lines by its new method of transfer. The new method of transfer puts the connecting rail lines to less expense under the lighterage-free rates than the old method. It may be argued, therefore, that they would be justified in making any payments that might be necessary for the purpose of inducing the establishment of the new method of transfer, provided they were left with a net saving. There is here no evidence, however, that payments were or are necessary for this purpose. The contract between Seatrain and complainant, to which defendant rail lines are not parties, is not evidence to this effect, in view of the control which Seatrain exercises over complainant. No such payments have, so far as the record shows, been exacted or obtained by Seatrain from an independent rail connection. There is ample reason to conclude, also, that the improved method of transfer is only an incident to the Seatrain plan

> of transportation, and that this plan has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections."

In its 17th finding of fact (R. 124) the District Court stated:

> "As a further ground for its decision, the Commission found that the payments might be justified as a part of Hoboken's expense if they were 'necessary for the purpose of inducing the establishment of the new method of transfer.' * * *."

In this the Court was in error. This was not a ground for the Commission's decision. The case before the Commission was fully disposed of by its finding that rail transportation began and ended at Seatrain's car cradle and that the Hoboken's payments to Seatrain were not legitimate operating costs attributable to Hoboken's rail service. The Commission made no such finding as the Court suggests. On the contrary it merely noted a question *whether* such payments might be justified as compensation payable to *Seatrain* for the savings accomplished for the *rail lines* by its new method of transfer. By "rail lines" it is evident that the Commission meant the *trunk lines*, since if loading or unloading was necessary under the lighterage-free rates the Hoboken was reimbursed therefor by the trunk lines and any "savings" accrued only to the trunk lines. But the Commission found it unnecessary to decide this question for two reasons. First, the trunk lines were not parties to the agree-

ment, and in view of Seatrain's control of the Hoboken it could not be construed as a voluntary payment by the trunk lines for the purpose. Secondly, the proceeding did not iinvolve the respective rights and obligations of Seatrain and the trunk lines in the handling of rail-water traffic, such as are involved in Seatrain's pending divisions complaint, I. C. C. No. 28668. The divisions of Seatrain and the trunk lines are directly in issue in that case, and Seatrain has there raised the precise question here indicated by the Commission (R. 647-650) and it can there be determined. Since the Commission's report involved in the instant proceeding was decided July, 1939, and the complaint in Docket No. 28668 was not filed until May, 1941, it will be seen that the issue anticipated by the Commission has become an actuality.

B. The Decision of the District Court Is Based upon Certain Erroneous Assumptions of Fact.

The District Court proceeded upon the assumptions that the Hoboken, under its contract to make payments to Seatrain, had the right "to use the Seatrain devices to fulfill the obligations of carriage," and that the payments were made "for the interconnection which saves Hoboken the labor and costs of loading and unloading freight" (R. 117). More specifically it found that under the contract the "Hoboken makes Seatrain its agent to put the cars upon and take them off the cradle" (R. 116). These assumptions of the Court are directly contrary to the facts shown of record.

1. THE CAR CRANE AT HOBOKEN, N. J., WAS LEASED AND OPERATED BY SEATRAIN, WAS USED EXCLUSIVELY BY IT, AND IS THE EQUIVALENT OF SHIP'S TACKLE.

While the District Court did not directly so state, it appears to have been under the impression that the fact of interchange at the Seatrain cradle connoted some use of the cradle by the Hoboken for the performance of its own rail transportation for which it should properly make some payment. Such an impression is wholly erroneous.

Although the record shows the Hoboken as the owner of the car crane employed in the loading and unloading the ships of Seatrain, the latter having "loaned them money to build it on their ground and to get 6 per cent on their investment" (R. 334), the crane at all times was under lease to Seatrain, was operated and exclusively used by it, and was regarded both by Seatrain and the Hoboken as the equivalent of ship's tackle (R. 230, 332, 386, 508, 511, 258). This appears from the first recital of the agreement of November 21, 1932, between the Hoboken and Seatrain (R. 50), and from the following provision of paragraph 1 of that agreement (R. 51):

> "1. With respect to freight transported by Railroad and consigned to or for delivery to Seatrain when to be delivered, in cars, delivery shall be considered to have been accomplished by Railroad when the cars have been placed upon a cradle of the car elevator on the pier alongside Seatrain's vessel (*the elevator being the equivalent of ship's tackle*)." (Italics inserted.)

To similar effect is the superseding agreement of February 24, 1937 (R. 508, 511, 258), under which the Hoboken granted "to Seatrain the exclusive use of the crane or car elevator * * *."

The Commission's description of the method of loading Seatrain vessels as set forth in *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 219-220,* to which its report in the instant case made reference (R. 34), makes very clear the fact that the cradles are integral parts of the Seatrain vessels, serving as hatch covers for the several decks. The District Court made the following finding of similar import:

> "There is one cradle for each track on each deck of the vessel and, when the loading of each deck is accomplished, the cradles are left in place flush with the deck, each cradle closing a hatch" (R. 110).

The agreement of February 24, 1937, contains further confirmation of this fact in paragraph 3 thereof (R. 512) under which the Hoboken "leases to Seatrain seven flat cars for use by Seatrain in storing *cradles of Seatrain's vessels* when said vessels are in port, * * *." (Italics inserted.)

Witness Graham M. Brush, President of the Seatrain and the Hoboken (R. 183), testifying with respect to the Seatrain devices, stated:

> "The point of delivery between the Hoboken and Seatrain is the loading cradle which is ship sling for Seatrain" (R. 345).

* * * * * * * *

* The indicated portions of this decision appear *supra*, p. 7.

"* * * I don't want that question to give anyone the impression that the actual structure of the crane itself, the value of the crane itself, have we ever considered to be anything but a part of a normal steamship terminal.

"In other words, the crane and the trestle is leased to Seatrain just the way the railroads lease their terminals with cranes and overhead gear, and so forth and so on, to steamships which dock at their terminals.

"I wanted to distinguish that; although the crane happened to be patented, or, at least, the crane happened to be a part of the patent, the crane itself is not patented. It is merely a part of a steamship terminal" (R. 230).

* * * * * * * *

"* * * We consider the crane as nothing but a crane on a ship for lifting the cargo aboard" (R. 386).

2. THE HOBOKEN DID NOT SECURE, BY ITS PAYMENTS TO SEATRAIN, THE ACTUAL PERFORMANCE OF ANY RAIL TRANSPORTATION SERVICE WHICH IT WAS ITSELF OBLIGATED TO PERFORM UNDER THE RAIL RATES.

Despite the contrary findings of the Commission, and of the District Court itself, the District Court erroneously assumed that the payments under the agreement of February 24, 1937 (R. 53, 259), secured for the Hoboken the actual performance of some rail transportation service which it was obligated to perform under the rail rates. This appears not only from the general language of the opinion of the Dis-

trict Court at Record page 117 but also from its statement that

> "* * * Hoboken makes Seatrain its agent to put the cars upon and take them off the cradle" (R. 116).

The District Court's assumption and conclusion in this respect are wholly in error.

While the terms of the agreement between the Hoboken and Seatrain of February 24, 1937 (R. 53), which was made just subsequent to the filing of the Hoboken's complaint before the Commission for increased divisions (R. 22, 26), contains language which may have misled the Court as to what the parties actually did under the contract, the record is entirely clear that the payments made to Seatrain by the Hoboken thereunder did not secure for it the physical performance of any rail transportation service actually performed and which it was obliged to accomplish under the lighterage-free rates the Commission was asked to divide.

The fact is that on carload freight interchanged with Seatrain at Hoboken, N. J., no loading or unloading of the cars is necessary in order to effect delivery or receipt of the freight at shipside. Nor is there any other rail transportation service the Hoboken is obligated to perform under the rail rates which Seatrain actually performs for it under the agreement pursuant to which the Hoboken's payments are made.

The Commission fully apprehended the precise transportation services and practices of the several

carriers incident to the interchange of carload freight with Seatrain at Hoboken, N. J., and made appropriate findings in this respect. Thus, at Record page 37, the Commission stated:

> "As fully described in *Investigation of Seatrain Lines, Inc., supra,*[*] the cars as well as the freight therein are interchanged between Seatrain vessels and the rail lines, and one of the advantages of the Seatrain service is that the expense of loading and unloading freight to and from the cars, necessary to through transportation in connection with other water carriers, is not necessary to through transportation in connection with Seatrain."

Again at Record page 47, the Commission found:

> "For purposes of its own, Seatrain prefers to receive and deliver the loaded car. *The unloading or loading of the car lading and its delivery or receipt at ship's tackle is therefore unnecessary.* The rail lines do all that is required when they place the cars in or take them from the Seatrain cradle. From this point of view the payments which complainant makes to Seatrain *cover no part of its transportation service under the lighterage-free rates* and are in addition to the full costs of that service." (Italics inserted.)

The District Court itself made the following finding of similar import:

> "By the use of the Seatrain method, goods and merchandise may be transported from shore to

[*] The description indicated appears *supra*, p. 7.

ship and from ship to shore without breaking bulk, and the necessity of loading and unloading the freight is eliminated" (R. 110).

If, in addition to the foregoing findings of the Commission and the Court, any further evidence were needed to show that the 73-cent per ton payment made by the Hoboken to Seatrain on lighterage-free freight does not secure for the Hoboken the actual performance of any rail transportation which it is obligated under the rail rates to accomplish, it would be found in the uncontroverted fact that the service of the Hoboken in interchanging with Seatrain non-lighterage-free freight, as to which it makes no such payment, is precisely identical with its service in interchanging lighterage-free freight as to which the payment is made. This was expressly recognized by the District Court in the following finding (R. 110):

> "With Seatrain freight regardless of how it is billed, whether as lighterage-free freight or non-lighterage-free freight, it is handled by Hoboken in precisely the same physical fashion."

C. The District Court Erred in Finding that the Commission Did Not Determine the *"Quantum Meruit"* of the Hoboken-Seatrain Relationship and Did Not Determine the Existence and Proper Division of the So-Called "Windfall."

1. THE COMMISSION DETERMINED THE *"Quantum Meruit"* OF THE HOBOKEN-SEATRAIN RELATIONSHIP AND FOUND IT OF NO VALUE.

The District Court's criticism of the Commission's decision in this respect reads as follows:

> "Conceding *arguendo* that the contract between Hoboken and Seatrain does not constitute a valid obligation to be considered in determining Hoboken's costs, that does not necessarily mean that there is no obligation upon Hoboken to make some payment for the interconnection which saves Hoboken the labor and costs of loading and unloading freight. The Commission should have determined the *quantum meruit* of the relationship. It is possible that there was no service or relationship of value" (R. 117).

Since the case before the Commission turned upon the question of the allowance to the Hoboken in its divisions of the payments which it made to Seatrain, and since the record was replete with evidence on that matter, the findings of the Commission that the rail transportation began and ended at the Seatrain cradle and that the payments to Seatrain were no part of the costs of the rail transportation, together with its ultimate finding that the Hoboken's divisions were not unjust, unreasonably low, inequitable, or unduly prejudicial to it, and that the corresponding divisions received by the trunk lines were not unjust, unreasonably high, inequitable, or unduly preferential of them, constituted a determination of the *quantum meruit* of the Hoboken-Seatrain relationship.

2. THERE WAS NO WINDFALL IN ANY TRUE SENSE, AND THE COMMISSION SO FOUND.

a. *The rates out of which the Hoboken sought increased divisions comprehended various services of*

receipt and delivery and not shipside receipt and delivery only.

Concerning the rates out of which the Hoboken sought increased divisions, the Commission stated that they were "based on average conditions * * *" (R. 48). This was a matter well understood by the Commission and the parties before it as indicated by the record. Thus, the Hoboken's complaint before the Commission contained in paragraph 4 thereof (R. 23) the allegation that it and the trunk lines were "parties to numerous joint through class and commodity rates * * *." Paragraph 5 of the same complaint made reference to additional "joint through class and commodity rates published or participated in by defendants Southern and Southwestern railroads and Seatrain Lines, Inc., as well as by defendants Eastern Trunk Line railroads, * * *" to which complainant was also a party. The complaint then asserts that the class rates mentioned and many of the commodity rates "were established pursuant to findings or orders of this Commission."

The class rates in Eastern territory had been prescribed by the Commission in *Eastern Class-Rate Investigation*, 164 I. C. C. 314 (1930). In that case (p. 404) the Commission stated that "the rates herein prescribed are based to a very considerable extent upon average conditions; * * *." In that report at pages 425-445, and in a subsequent report in the same proceeding, 171 I. C. C. 481, at pages 489-493, the Commission particularly dealt with the rates to and

from the New York City rate group and discussed the New York Harbor terminal services involved in connection with the prescribed rates. These were well-known matters of which the Commission and the parties took cognizance (R. 291). Complainant's traffic witness testified that "on so-called long-haul freight, the rates to Hoboken are the same as the rates to Manhattan, or to Brooklyn, or any other parts of the New York Harbor district" (R. 291), and the application of the Commission-prescribed class rates to and from the New York rate group for distances more and less than 100 miles was discussed by traffic witnesses for both the respective parties (R. 427-428, 453-456).

Generally speaking the class rates to New York, N. Y., for distances approximately 100 miles and more apply also to numerous grouped destinations in the surrounding district,[5] including deliveries on the New Jersey shore and in New York Harbor within the so-called lighterage-free limits. A generally similar situation obtains in the case of commodity rates to New York, subject to variations as to distances for which the New York rate will have group application, and with appropriate exceptions as to particular commodities. Such were the rates which applied to Hoboken, N. J., and out of which the Hoboken sought increased divisions when charged on freight interchanged with Seatrain. Such rates for convenience might be called New York rates.

These New York rates, or lighterage-free rates, as they have been generally termed upon this record, apply for many and various types of receipt and

delivery. For example, a carload shipment moving under such a rate to a private siding served by the Hoboken would be switched by the Hoboken to the consignee's siding and be unloaded by him at his expense. Another such shipment might be given team-track delivery, and the consignee at his own expense would unload the freight. In neither case would there be any lighterage or unloading service. These may be regarded as examples of minimum terminal service under the rates. On the other hand, these New York rates would also cover the unloading of the freight by the railroads from car to lighter on the New Jersey side of the Hudson River, and lighterage service to shipside or ship's pier on the Manhattan shore or elsewhere about New York Harbor within the lighterage limits. Because this maximum service is available thereunder, these rates are frequently called lighterage-free rates. Such rates also provided for the unloading and handling of the freight from cars on the New Jersey shore to shipside, of which the operation involved in the Hoboken's delivery of lighterage-free freight to vessels of the Pan-Atlantic Steamship Company is an example. On the other hand, delivery of freight moving under such rates in open-top cars where the same can be placed alongside ship within reach of ship's tackle, is accomplished in that manner without further railroad service (R. 34, 47, 110, 114, 158, 418, 419).

The District Court appears to have been under the erroneous impression that the rates to be divided included therein the sum of 75 cents per ton to com-

pensate the rail carriers for the cost of loading and unloading freight cars, and that when such services are not actually performed there is a "saving" to them of that amount. Such rates to New York, under which lighterage service is available if required, are the same regardless of the particular type of delivery employed. On some shipments a maximum terminal service is necessary, and on others a lesser terminal service. This is the meaning of the Commission's statement that

> "Those rates, however, are based on average conditions, and a similar unearned benefit would accrue if a steamship company now docking on the Manhattan waterfront and served by lighter should shift to a dock with direct rail connections on the Jersey shore. It would hardly be suggested that in such an event the defendant rail lines should compensate the steamship company for the change" (R. 48).

b. *Under the lighterage-free rates there is no obligation on the trunk lines to load or unload carload freight except as may be necessary to effect receipt or delivery.*

As above noted, the character and extent of the physical service performed by the railroads at New York Harbor in the receipt, delivery, and interchange of lighterage-free freight are not uniform, but vary greatly dependent upon numerous facts and circumstances. At some of the railroad waterfront terminals in New York Harbor, and particularly on the New Jersey side, open-top railroad cars are placed

alongside vessels, and the freight is handled directly between car and vessel by ship's tackle. Where this sort of operation takes place, the railroads do not perform any lighterage service and do not load or unload, or pay for loading or unloading, the cars (R. 418-419). When open-top cars are thus placed alongside the vessel in satisfaction of the railroad's obligation to make the freight available for handling by the connecting water carriers, the freight is within reach of the ship's tackle and the loading or unloading of the vessel is performed by or at the expense of the steamship. No loading or unloading costs are paid or borne by the railroads on the above-mentioned traffic even though it moves to or from the port under lighterage-free rates, and no lighterage service is performed because none is necessary (R. 418-419).

As indicated by these practices there is no positive or fixed undertaking or obligation on the Hoboken, or on the trunk lines, by tariff or otherwise, to load or unload or to lighter all carload freight subject to lighterage-free rates. The only obligation of the rail carriers, in effecting an interchange of lighterage-free freight with a water carrier in New York Harbor, whether a break bulk steamship or Seatrain vessel, is to deliver or receive the freight within reach of ship's tackle or alongside the ship so that the water or rail transportation may be completed by the connecting line (R. 46, 47). In the discharge of this obligation, the rail carriers perform such lightering and loading and unloading of lighterage free freight as is

necessary in order to accomplish the interchange with the connecting water carrier. In the interchange with Seatrain, this obligation is completely satisfied and extinguished when cars of freight are placed at or removed from alongside the Seatrain vessel at the car cradle. The placement at the car cradle is at the location desired by Seatrain in the utilization of its car crane and other ship-loading and unloading devices and appurtenances.

If, contrary to the fact, there were a tariff obligation on the part of the railroads under lighterage-free rates to load or unload all carload freight in any event, it would be necessary in compliance with such duty actually to load or unload the cars interchanged with Seatrain. But the cars are not in fact so loaded or unloaded at the point of interchange, and Seatrain does not desire it. Such loading or unloading would nullify the benefits to Seatrain resulting from its unique method of operation and from the use of freight cars as packages or containers. As found by the Commission. "For purposes of its own, Seatrain prefers to receive and deliver the loaded car" (R. 47).

c. The Commission's finding, that the lack of necessity of loading or unloading cars of freight interchanged with Seatrain did not represent a windfall or saving to the rail lines in any true sense, is adequate.

It is to be remembered that virtually the whole controversy before the Commission turned on the question as to whether the Hoboken's payments to

Seatrain on lighterage-free freight could be included in its legitimate costs of performing its rail service under the rates to be divided. The evidence before the Commission made it wholly clear that if it dismissed the complaint of the Hoboken (filed in December, 1936) which was based upon the payments to Seatrain provided for in the agreement of February 24, 1937, the net position of the Hoboken would not be affected, but the trunk lines would have the benefit of not having to provide their maximum terminal delivery service in effectuating the interchange of carload freight with Seatrain. It was likewise clear upon the record that if the Commission were to sustain the complaint of the Hoboken, the agreement between it and Seatrain would operate to require the trunk lines to pay to *Seatrain* the amount by which their expenses of operation were not increased, due to the lack of necessity of having to load or unload freight to effectuate the interchange. In this situation the Commission found as follows:

> "It is true, as complainant points out, that if the payments which it now makes to Seatrain are not borne by defendant rail lines through a decrease in their divisions and a corresponding increase of complainant's divisions, they will receive an unearned benefit. This comes about from the fact that this new method makes it unnecessary for the rail lines to perform all the service the lighterage-free rates. Those rates, however, which they hold themselves out to perform under are based on average conditions, and a similar unearned benefit would accrue if a steamship

> company now docking on the Manhattan waterfront and served by lighter should shift to a dock with direct rail connection on the Jersey shore. It would hardly be suggested that in such an event the defendant rail lines should compensate the steamship company for the change" (R. 48).

This finding, while not formally numbered or denominated as such,* read in the light of the issue before the Commission, is wholly clear and adequate. It says plainly that the benefit which accrues to the trunk lines, when carload freight moving under lighterage-free rates is interchanged with Seatrain, by reason of the lack of necessity for unloading the freight from the cars, is not properly to be regarded as a "windfall" or "saving" to them. The illustration which the Commission employs makes this doubly clear. Thus, using the Commission's example, if the theory of the Hoboken's complaint were sound and were given general application, a steamship company now docking on the Manhattan waterfront and served by lighter could shift to a dock with direct rail connections on the New Jersey shore and demand that the rail carrier pay it the amount which the railroad

* In most cases the Commission's reports covering the facts of record serve as its findings without the making of separate formal findings of fact. "Reasons which underlie the expert opinion which the Commission expresses * * * need not be marshalled and labelled as findings in order to make intelligible the Commission's conclusion or ultimate finding or to make possible the performance on the part of the courts of the functions delegated to them. Here as in other situations (*Colorado* v. *United States*, 271 U. S. 153, 166-169; *United States* v. *Louisiana*, 290 U. S. 70, 76-77; *Florida* v. *United States*, 292 U. S. 1, 8-9) it is the conclusion or ultimate finding of the Commission together with its reasons and supporting data which are essential. Congress has required no more." *Group of Inst Investors* v. *C., M., St. P. & P. R. Co.*, 317 U. S. , 63 S. Ct. 727

was "saved" by reason of the fact that lighterage service had become unnecessary.

d. *If the Commission had included in the Hoboken's transportation costs the payments made to Seatrain, the effect would have been to impose upon the trunk lines the expense of loading and unloading Seatrain's vessels.*

As previously noted* the Seatrain car cradle and crane are the exact functional equivalents of the ordinary cargo-type steamship's cargo mast, tackle, and sling. When the Hoboken places or receives a car at the Seatrain cradle, which the Commission found was the point of interchange where rail transportation ended, it has performed its full railroad obligation to place or receive the freight alongside vessel. Railroads at New York Harbor do not pay or bear any of the costs incurred in loading or unloading steamships, or in stowing freight within the ship. They merely place the freight within reach of the ship's tackle or receive it after the ship's tackle has removed it from the hold of the vessel. The loading or unloading of Seatrain vessels by means of the car cradle and elevator, and the selective placement of cars in the vessel, are not different in principle than the work of loading, unloading, and stowing performed by break-bulk steamships at their own expense. The car cradle and crane used by Seatrain are no more than ship's tackle and sling, in fact are precisely that, and the railroad cars are freight containers or packages.

* *V. supra*, p. 44.

For these reasons if the Commission were to require the trunk lines to pay the Hoboken in accordance with its demands, in order that it might make the agreed payments to Seatrain, the effect would be to require the trunk lines to bear the expense of loading or unloading Seatrain's vessels. Such expense ought to be borne by Seatrain and not by the trunk lines.

3. IF, CONTRARY TO THE FACT, THERE WERE A "WINDFALL" RESULTING FROM THE ABSENCE OF LOADING OR UNLOADING WHEN LIGHTERAGE-FREE FREIGHT IS INTERCHANGED WITH SEATRAIN, IT WOULD BE A MATTER FOR CONSIDERATION IN DETERMINING DIVISIONS OF JOINT RAIL-WATER RATES TO WHICH BOTH SEATRAIN AND THE TRUNK LINES WERE PARTIES. SUCH A COMPLAINT BY SEATRAIN IS PENDING.

The District Court erred in concluding that if a windfall actually exists it should be apportioned between the Hoboken and the trunk lines. If the Hoboken were to be paid all or some proportionate part of the lesser cost to the trunk lines by reason of the lack of necessity for loading or unloading cars of lighterage-free freight interchanged with Seatrain, the amount received by it in the first instance would merely flow from the Hoboken as an intermediary to Seatrain as the ultimate beneficiary and real party in interest, although Seatrain is not a party to the Hoboken's divisions case, and Seatrain's rates and divisions are not in issue in the instant proceeding. If, contrary to the fact, there were a windfall by reason of Seatrain's use of its ship-loading devices,

an appropriate occasion for the Commission to determine its existence and how it should be apportioned would be in such a proceeding as the pending complaint of Seatrain, I. C. C. No. 28668, where it asks the Commission to prescribe divisions, as among itself and the eastern and southwestern railroads, of the joint rail-Seatrain-rail rates prescribed in Docket No. 25727, *Seatrain Lines Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7; 243 I. C. C. 199.

The soundness of this conclusion is attested by the fact that Seatrain's divisions complaint (R. 643) in paragraphs 9 to 13 thereof (R. 647-650) particularly counts upon its ship-loading devices as a reason justifying the divisions it there seeks.

Upon the record it must be clear that the real party interested in pressing the instant complaint is Seatrain and not the Hoboken. The question may therefore arise why Seatrain should elect to seek payments from the trunk lines through the Hoboken as an intermediary rather than directly in its own divisions complaint against the railroads. The answer to this question is made clear by the letter which counsel for the Hoboken addressed to Judge Fake under date of January 10, 1943, in response to the Judge's letter to counsel of December 23, 1941, inquiring as to the status of the latter complaint. This response on the part of the Hoboken states plainly that Seatrain's divisions complaint can operate only in respect of the joint rail-water-rail rates prescribed by the Commission between interior eastern points on the one hand and points in the South and Southwest on the other.

and can have no application to the larger portion of the Seatrain traffic which is to and from Cuba. But this is a direct admission by the Hoboken that any consideration to be given by the Commission to economies resulting from interchanging carload traffic with Seatrain should be reserved, so far as joint rail-water-rail rates are concerned, to a proceeding in which a division of those rates as between Seatrain and the railroads is in issue.

The fact that there are no joint rail-water rates in effect to Cuba in connection with Seatrain plainly enough indicates the reason for Seatrain's effort in the instant case to force the trunk lines to contribute to it through the Hoboken. But this circumstance cannot alter the fact that the instant proceeding, to which Seatrain is not a party, cannot properly be made a vehicle for compelling the trunk lines to pay to it amounts predicated upon their alleged "saving" of expense when carload freight is interchanged with Seatrain vessels as compared with the expense of interchanging freight with vessels of the ordinary cargo type.

4. IF THERE WERE A "WINDFALL" FOR DIVISION BETWEEN THE RAIL LINES IN THIS CASE, THE COMMISSION HAS DIVIDED IT.

The central matter for consideration in the case before the Commission was whether the Hoboken in its divisions of the lighterage-free rail rates as applied on traffic interchanged with Seatrain, was entitled to something more than its regular switching service

divisions by reason of the lesser terminal expense incurred by the rail lines on such traffic. The record fully dealt with this question and the Commission's report discloses that it gave extensive consideration to it. The report also states fully the Commission's reasons for its ultimate conclusions in this regard. These reasons were summed up by the Commission as follows:

> "Summarizing this discussion, we agree that complainant is entitled to divisions out of the joint rates in question which are based upon the full costs of performing its portions of the through transportation service, including a fair return, but subject to the qualifications above indicated. We do not agree, however, that the payments which complainant makes under its contract with Seatrain can properly be regarded, upon the evidence presented, as a necessary part of the costs of this service; and, if these payments are not included, the conclusion is warranted by the record that complainant is adequately compensated by its existing divisions. While the result has been to increase the divisions received by defendant rail lines under the lighterage-free rates without change in the service which they perform, this is because some of the service heretofore performed under the lighterage-free rates has become unnecessary." (R. 48-49).

If therefore, there were in fact a "windfall" for division as between the Hoboken and the other eastern rail carriers, then it must be concluded that the Commission made such division when it found that—

> "* * * complainant's divisions here in issue are not unjust, unreasonably low, inequitable, or unduly prejudicial to complainant and that the corresponding divisions received by the defendant rail lines are not unjust, unreasonably high, inequitable, or unduly preferential of them" (R. 49).

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION FAILED IN ITS STATUTORY DUTY TO PRESCRIBE JUST, EQUITABLE, AND NON-PREJUDICIAL DIVISIONS.*

The District Court's condemnation of the Commission's decision for failure to comply with the statute† is as follows:

> "The act directs the Commission to inquire into the facts and to prescribe just and equitable divisions and not unjustly to prefer or prejudice any party. There was no evidence presented to show that the granting of the entire saving of the loading or unloading of the cars was not an undue emolument for the trunk line railroads. The Commission's remark that the defendant's rates were based on average costs scarcely constitutes a finding as prescribed by the Act. The Commission merely stated in conclusion that such divisions are not unduly preferential" (R. 118).

While thus stated as a separate ground for setting aside the Commission's order, the Court's criticism

* This point is supported by Assignments of Error Nos. 1, 2, 3, 6, 7, 8, 9, 11, 16, 17, 18, and 19 (R. 129-132).

† Section 15(6) of the Interstate Commerce Act, U. S. Code, Title 28, Sec. 15(6).

in this respect, to be properly understood, must be read in connection with its preceding statements (R. 117) that "the issue at bar is not predicated solely upon Hoboken's legitimate costs" and that "The entire inquiry should be directed to securing 'a fair and equitable division' of the rates." Because of its impression that the railroads secured a "windfall" or a "saving" when lighterage-free freight was interchanged with Seatrain—an impression which is shown above* to be based upon a misapprehension of the character of the rates and of the railroads' operations and obligations thereunder—the Court here concluded that it was not a sufficient compliance with the statute for the Commission to prescribe for the Hoboken a division based upon its legitimate costs plus fair return, but that the statute required "a fair and equitable division" of the supposed "windfall" or "emolument."

Since the erroneous nature of the Court's assumptions concerning the "windfall" or "emolument" has already been demonstrated, it will be sufficient here to note that the Commission's approval of divisions for the Hoboken in a fixed or flat amount, rather than on the basis of percentage proportions, responded precisely to the theory upon which the Hoboken presented its evidence, and that the Commission's determination was predicated upon adequate findings amply supported by the evidence.

* *V. supra*, p. 50.

A. The Hoboken Presented Its Case on the Theory, Which the Commission Accepted, That it Should Receive As a Division a Uniform Amount Per Ton Without Particular Regard to the Balances Remaining to the Trunk Lines.

The case before the Commission involved the division, as between the Hoboken and the trunk lines, of a multitude of rail rates on numberless commodities, of varying amounts, and for different distances between Hoboken, N. J., and interior eastern points. Thus, the Seatrain-Trunk Line carload traffic amounted to 6,517 cars in 1936, and to 6,611 cars in 1937 (R. 606). If these various rates were divided in accordance with proportionate service, the static amount of the Hoboken's service, coupled with a variable service by the trunk lines, would have necessitated the fixation of innumerable different percentage divisions. In this situation the Hoboken expressly asked the Commission to accord it a division of fixed amount per ton based upon the cost of performing its rail service plus a fair return without regard to the amount of the individual rates or the portions thereof which would remain to the trunk lines. To this the Commission agreed (R. 46, 47).

A similar conclusion as to the appropriateness of fixing a reasonable switching charge as the division for a short line railroad was reached in *Atlantic Coast Line R. Co.* v. *Cape Fear Rys., Inc.*, 197 I. C. C. 397, 408, where the Commission concluded:

> "The record is persuasive that the services rendered by defendant in connection with the

traffic under consideration are in their nature mere switching movements, the performance of which is not attended with any unusual or particular difficulty. Accordingly a fair switching charge is all that defendant is entitled to as its portion of the joint through rates."

The Cape Fear sought to set aside the Commission's order, urging in effect that its share should have been fixed in proportion to the respective services of itself and the Atlantic Coast Line. The specially-constituted District Court in *Cape Fear Rys.* v. *United States*, 7 F. Supp. 429, at pages 431 and 432, stated:

"The question before the Commission was, not the cost to the Coast Line of its share of the transportation, but what was a proper and reasonable share of the revenue for the Cape Fear to receive. * * *"

* * * * * * *

"We think, therefore, that there is no reason to believe that $5.85 is not a just and reasonable share of the rate. That is especially true where, as here, the service rendered by the complaining road is substantially identical in all shipments so far as the distance of haul and handling is concerned, and where in the great majority of instances the consignee of shipments destined to and consignor of those from the reservation is the same person, namely, the government, and where, as in the instant case, the complaining road maintains no passenger, express, or mail service but only switching service not based on any regular schedule. Under the circumstances, we think it is apparent that a per car basis of division is the

fairest and most equitable that could have been applied."

The District Court's decision was affirmed in a *Per Curiam* opinion at 294 U. S. 693.

B. The Commission's Finding That the Hoboken's Existing Divisions on Lighterage-Free Traffic Interchanged with Seatrain Were Just, Reasonable, and Equitable Were Predicated Upon Sufficient Findings Which Were Amply Supported By the Evidence.

Not only did the Commission determine that the divisions which the trunk lines were currently according the Hoboken on lighterage-free traffic interchanged with Seatrain were sufficient to meet all its legitimate costs of performing its rail transportation service and provide a fair return, but it also found that such division complied with the statute in respect of their equitable and non-prejudicial character as well. More specifically the Commission found:

> "We find, therefore, that complainant's divisions here in issue are not unjust, unreasonably low, inequitable, or unduly prejudicial to complainant and that the corresponding divisions received by the defendant rail lines are not unjust, unreasonably high, inequitable, or unduly preferential of them" (R. 49).

1. THE COMMISSION'S ULTIMATE FINDING THAT THE HOBOKEN'S EXISTING DIVISIONS WERE EQUITABLE AND NON-PREJUDICIAL WAS SUPPORTED BY SUBORDINATE FINDINGS OF FACT.

The ultimate finding of the Commission, last above quoted, to the effect that the Hoboken's divisions were

not unjust, inequitable, or unduly prejudicial to it were amply supported by subordinate findings of fact which bore upon the equitable nature of the existing divisions. As to the Hoboken, the Commission found:

> "The record warrants the conclusion that the former division of 60 cents and the present divisions of 63 and 66 cents are sufficient to cover the cost of the service performed by complainant and also a reasonable return on the property owned or used by it in performing such service."

With respect to the rates of return earned by the principal ten New York Harbor railroads which were named as defendants in the Hoboken complaint, the Commission stated:

> "As contrasted with complainant's income accounts for 1936 and 1937 as adjusted by it and as further adjusted, the net railway operating income for 10 New York Harbor railroads[4] show a rate of return on investment in railway property used in transportation ranging from nothing to 3.23 per cent in 1936 and from nothing to 2.72 per cent in 1937, and for the 10 roads as a whole 2.67 per cent in 1936 and 2.21 per cent in 1937. Four of the ten roads, namely, the Erie, the New Jersey & New York, the New York, Ontario & Western, and the New York, Susquehanna & Western, are in bankruptcy" (R. 44).

The Commission further considered comparisons of complainant's divisions with those accorded the so-

[4] "Baltimore & Ohio; Central Railroad of New Jersey; Delaware, Lackawanna & Western; Erie; Lehigh Valley; New Jersey & New York; New York Central; New York, Ontario & Western; New York, Susquehanna & Western, and Pennsylvania."

called contract terminals in Brooklyn, N. Y., as possibly bearing upon the equitable character of the Hoboken's divisions, and found as follows:

> "Complainant contends that defendant's earnings will not be inequitable or unduly low if they pay complainant a division of $1.35 on lighterage-free freight and shows that on such freight to and from other steamship lines defendants pay complainant a division of $1.35; that on traffic to and from so-called contract terminals in Brooklyn, N. Y., defendants pay from 5.3 to 8 cents per 100 pounds; and that the costs of some of the lighterage movements in New York Harbor, including movement to and from piers served by complainant, were greater than $1.35 per ton in 1933 and 1934. None of the services for which these payments are made or costs incurred is comparable to the service performed by complainant on the traffic here considered" (R. 44, 45).

Further, on the subject of the equitable nature of the existing divisions, the Commission made the following finding based upon a study introduced by the Hoboken itself:

> "Complainant also shows that during the months of March and September it interchanged with defendants 1,102 carloads of Seatrain traffic and that the average loading of these cars was 30.9 tons, the average rail haul 258 miles, and the average revenue $120.86 per car. Complainant's revenue on such traffic at 60 cents per ton

was $18.54 per car and 15 per cent of the total revenue. On the basis of a division of $1.35 it would have been $40.72 per car, leaving slightly less than two-thirds of the total revenue to defendants for their 258 mile haul and terminal service at origin" (R. 45).

By contrast, the distance over the rails of the Hoboken from the Erie interchange to the Seatrain cradle, as scaled from map Exhibit 29 (R. 528, 364), is about 2500 feet.

An exhibit from the trunk lines' traffic study shows 94 cars handled under lighterage-free rates as to which the Hoboken's revenue would have been $48.47 per car at the claimed division of $1.35 per ton (R. 581, 456-457).

a. *The District Court erred in considering a theoretical rate which was not typical of the rates to be divided.*

The finding of the Commission last above quoted is of particular significance in that it shows how greatly in error was the District Court in its conception of the underlying facts of the case and particularly of the measure or amount of the rates which were to be divided. Thus, at Record page 111, the Court states that the Commission has established a through rate of $7.00 per ton to shipside out of which the trunk lines receive $5.65 on break-bulk lighterage-free freight and the Hoboken, $1.35, 60 cents of which goes to the latter as compensation for

switching charges and 75 cents as reimbursement for the cost of loading, unloading, and transferring freight between the freight cars and shipside. The statement of the Court in this connection indicates that it may have been under the erroneous impression that the only rate to be divided was in the amount of $7.00 per ton. The traffic interchanged between Hoboken and Seatrain covers a wide variety of articles and commodities transported to and from many different origin and destination points in Eastern territory. There are literally thousands of different rates involved in the divisional dispute (R. 571-594, 456-457). Exhibit 24 (R. 523, 275), introduced by the Hoboken, from which the Commission took the figures appearing in the foregoing finding shows that the average rate was $3.91 a ton. The use of $7.00 per ton as illustrative or typical of the rates to be divided is misleading and distorts the allocation of revenue between the contesting parties.

Considering its extremely short switching haul, the Commission's finding that the Hoboken under its 60-cent division receives 15 percent of the total revenue out of an average rail haul of 258 miles, and that under the divisions sought the Hoboken would receive more than one-third of the total revenue, not only shows the error of fact into which the District Court fell, but constitutes definite support for the Commission's ultimate administrative conclusion that the existing divisions were not unjust, inequitable, or unduly prejudicial to the Hoboken.

2. THE RECORD AMPLY SUPPORTED THE COMMISSION'S FINDINGS.

The findings of the Commission which underlie and support its ultimate conclusions with respect to the equitable and non-prejudicial character of the Hoboken's present divisions, which are quoted above* are fully supported by the Record. This fact has at no time been challenged. But more than this, the record contains a wealth of evidence upon which the Commission properly reached its ultimate conclusion in this respect. A few examples will now be noted.

a. *The evidence before the Commission showed that the divisions sought by the Hoboken would leave the trunk lines insufficient funds for the transportation service performed by them.*

The Hoboken's traffic study, as noted above,† covered 1102 cars of trunk-line freight interchanged in March and September, 1937, which yielded average rail revenue of $120.86 for an average haul of 258 miles. Had the Hoboken secured a division of $1.35 per ton on this traffic it would have obtained 34.5 percent of the revenue, for a switching service of less than a mile.

On 39 cars of lighterage-free freight interchanged with Seatrain the total eastern rail revenue was $2,367.39, of which the Hoboken, under its claimed division of $1.35 per ton, would have received

* *V. supra*, p. 68.
† *V. supra*, p. 70.

$1,413.87, or 59.7 percent of the whole (R. 580, 593, 457). On 25 cars of wire and wire articles from Allentown, Pa., to Hoboken, N. J., and Havana, Cuba, the total eastern rail revenue amounted to $1,341.36, of which the Hoboken's share under the divisions demanded would have been $952.09, or 71 percent of the total rail charges to Hoboken, N. J. (R. 593).

C. The District Court Erroneously Substituted Its Judgment for that of the Commission In An Administrative Matter In that It Concluded that the Divisions of the Hoboken Were Inequitable and Prejudicial to It.

The decision of the District Court, after directing the Commission to make a redetermination of certain matters, concluded as follows:

> "It should likewise determine a division of the through rate which would not be unduly prejudicial or preferential to any of the parties" (R. 119).

In terms the District Court disavowed any authority on its part to substitute its judgment for that of the Commission in an administrative matter but in actuality, and apparently because of its misapprehension as to the nature of the rates involved, the carrier services, practices, and obligation thereunder, it definitely substituted its judgment for that of the Commission. True, it did not attempt to determine what would be reasonable, equitable, and non-prejudicial divisions as between the parties to the pro-

ceeding. But it was no less a substitution of its judgment for that of the Commission for it to find, as it plainly did, that the divisions fixed by the Commission were not the just, equitable, and non-prejudicial divisions required by the statute because of the Commission's refusal to include in the Hoboken's divisions something in respect to its payments to Seatrain.

V. THE DISTRICT COURT ERRED IN DIRECTING THE COMMISSION TO FIND WHETHER "THE SEATRAIN DEVICES ARE AN EFFICIENT AID TO RAILROAD TRANSPORTATION," TO "EVALUATE THE WORTH OF THE DEVICES TO HOBOKEN AND A LEGITIMATE PAYMENT THEREFOR," TO INCLUDE "IN THE BASE UPON WHICH HOBOKEN'S FAIR RETURN IS CALCULATED, THE TRUE VALUE OF THE SEATRAIN DEVICES," AND TO "SET THE VALUE OF THE CONTRACT AND THE SEATRAIN DEVICES TO THE HOBOKEN."*

The decision of the District Court in this respect reads as follows:

> "If the Commission should find that the Seatrain devices are an efficient aid to railroad transportation, the Commission should evaluate the worth of the devices to Hoboken and a legitimate payment therefor; in short, including in

* This point is supported by Assignments of Error Nos. 2, 4, 5, 7, 9, 12, 13, 15, 17, and 18 (R. 129-132).

the base upon which Hoboken's fair return is calculated, the true value of the Seatrain devices. In effect, the Commission, as a representative of the public interest and the public would set the value of the contract and the Seatrain devices to Hoboken (R. 118-119).

A. The Seatrain Devices and the Contract Between the Hoboken and Seatrain are of No Value to the Hoboken in the Performance of Rail Transportation Service Under Lighterage-Free Rates, and the Commission So Found.

The Court erred in directing the Commission to find whether the Seatrain devices are an efficient aid to railroad transportation. The Seatrain devices are covered by a patent which is personal to Seatrain and are used exclusively in connection with the performance of water transportation (R. 39, 227, 332). When the vessels are in operation between ports the cradles serve as hatch covers and portions of the decks. When the ships are in port one of the cradles is used as a ship's sling, and the others are stored on flat cars which Seatrain leases from the Hoboken for the purpose (R. 230, 345, 508, 511, 512, 258). The crane, which is owned by the Hoboken but is leased to Seatrain for the latter's exclusive use, is a fixed facility on the pier, but in elevating railroad cars it performs precisely the same functions as the cargo mast and tackle on the ordinary type of cargo ship (R. 230, 332, 386, 508, 511, 258). The Seatrain devices relate to water transportation, and have as their principal objective the facilitation of the loading and un-

loading of the vessels, thus saving time in port, and the better preservation of the freight by eliminating its handling to and from railroad cars at the steamship terminal (R. 330-332, 372, 386).

The Seatrain car cradle, crane, and other devices, have no value to the Hoboken because they are not essential to or used by the Hoboken in the performance of rail transportation service connected with the placement or the receipt of freight at the Seatrain car cradle alongside the vessel. The loading, unloading, and placement of the car within the Seatrain vessel, which are accomplished by the crane, cradle and other appurtenances, are performed for and on behalf of the steamship company and occur beyond the point at which the Commission found that rail transportation begins or ends. So far as the Hoboken is concerned, it is immaterial to it whether freight subject to lighterage-free rates is actually loaded or unloaded as an incident to the placement or receipt alongside the vessel, because the Hoboken always received the basic division of 60 cents per ton and obtains reimbursement of actual out-of-pocket expenses incurred for loading and unloading the cars when that is actually done, but not otherwise.

The Commission's findings that rail transportation commences or ends at the Seatrain car cradle and that expenses relating to property or services beyond that point should not be included in the Hoboken's legitimate operating expenses, are a determination by it that the Seatrain devices and the agreement with

Seatrain are without value to the Hoboken in the performance of rail transportation under the rates involved.

B. The Commission Could Not Properly Include the Value of Seatrain's Devices in the Base Upon Which the Hoboken's Fair Return is Calculated.

As shown above* the crane is that of Seatrain, being held by it under lease, and is used exclusively by it for terminal service incident to its water transportation. Conversely it is not at all used by the Hoboken nor by Seatrain as agent for the Hoboken in the performance of any rail transportation service. Under these circumstances it would have been entirely improper for the Commission to "evaluate the worth of the devices to Hoboken" or to include the value of such devices "in the base upon which Hoboken's fair return is calculated." See in this connection the provisions of Section 19a (b) First, of the valuation section of the Interstate Commerce Act. U. S. Code, Title 49, Sec. 19a.

C. Any Evaluation of Seatrain's Devices for the Purpose of Determining Divisions Would Have to be in Some Proceeding, such as Seatrain's Pending Divisions Complaint, Where Seatrain and the Trunk Lines Were Parties. This is Not Such a Case.

As previously shown† Seatrain has filed with the Commission under its Docket No. 28668 a complaint

* *V. supra*, p. 44.
† *V. supra*, pp. 11, 43.

which asks the Commission to prescribe the respective divisions for itself, the eastern trunk lines, and the southwestern railroads of the rail-water-rail rates prescribed by the Commission in Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry. Co.*, 226 I. C. C. 7, 243 I. C. C. 199. This complaint in paragraphs 9 to 13 (R. 647-650) particularly counts upon the value of its ship-loading devices as one of the grounds for the prescription of the divisions which it seeks. In such a case quite obviously the Commission would have to give consideration to such devices and their value to Seatrain as they might bear upon the divisions to be prescribed. In that proceeding Seatrain as well as the eastern railroads, including the Hoboken, and the southwestern railroads are parties. But Seatrain is not a party to the instant case and its divisions are not involved.

VI. CONCLUSION.

The findings of fact by the Court below are in substantial agreement with those of the Commission. The Court, however, disagreed with the Commission's conclusions and held that additional findings should have been made as to certain specified matters, when, in fact, the Commission made findings dealing adequately therewith. As appears from the facts set forth in earlier portions of this brief, the Commission acted on substantial evidence within the scope of its authority in accordance with the statutory provisions.

and the Court erred in usurping the administrative functions of the Commission and substituting its judgment for that of the Commission.

For the reasons indicated it is respectfully submitted that the decree of the District Court is in error and should be reversed.

Respectfully submitted

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SEPTEMBER 29, 1943.

APPENDIX.

Section 15(6) of the Interstate Commerce Act—

U. S. Code, Title 49, Sec. 15(6)—provides:

"Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable and equitable divisions thereof, to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and

used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge."

Section 1(4) of the Interstate Commerce Act—U. S. Code, Title 49, Sec. 1(4)—provides:

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."